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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1987

JAMES C. FREEMAN,

PETITIONER

versus

THE STATE OF GEORGIA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I.

DO PETITIONER'S CONVICTIONS AND CUMULATIVE PUNISHMENTS FOR VIOLATION OF OATH OF OFFICE AND MULTIPLE THEFT BY TAKING CHARGES VIOLATE THE DOUBLE JEOPARDY AND DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT TO THE U. S. CONSTITUTION (AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT) AS INTERPETED BY THIS COURT IN BLOCKBURGER v. U.S. AND ITS PROGENY, WHERE THE OFFENSES WERE "THE SAME", NOT INVOLVING ELEMENTS DISTINCT TO EACH OFFENSE?

II.

DOES GEORGIA'S PROSECUTION OF PETITIONER FOR CRIMES IN WHICH NEITHER CORPUS DELICTI NOR INTENT WAS PROVED, LOOKING AT THE FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U. S. CONSTITUTION, AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT?

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QUESTIONS PRESENTED FOR REVIEW

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PARTIES TO THE PROCEEDING

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APPLICATION FOR WRIT OF CERTIORARI

JAMES C. FREEMAN prays for a Writ of Certiorari to the Georgia Court of Appeals, which affirmed his convictions on three indictments, one consisting of 15 counts of violation of oath of office, one consisting of 15 counts of theft by taking and the third consisting of 10 counts of theft by taking, by opinion dated October 16, 1987, rehearing denied November 2, 1987 (Case No. 75080).

An application for writ of certiorari was filed with the Georgia Supreme Court and denied by order dated December 2, 1987, rehearing denied December 16, 1987 (Case No. 45224).

Because the record remains with the Georgia Court of Appeals, it is prayed that the Writ be directed to that Court.

OPINIONS BELOW

Reproduced in the appendix to this petition are: (1) the opinion of the Court of Appeals of Georgia dated October 16, 1987, affirming Petitioner's convictions, (2) the decision of the Court of Appeals of Georgia dated November 2, 1987, denying Petitioner's motion for rehearing, (3) the decision of the Georgia Supreme Court dated December 2, 1987, denying Petitioner's application for writ of certiorari, and (4) the order of the Georgia Supreme Court dated December 16, 1987, denying Petitioner's motion for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) which authorizes the grant of the Writ of Certiorari where a "right, privilege or immunity" under the Constitution of the United States is specially claimed or set up.

The Georgia Supreme Court denied Petitioner's timely motion for a writ of certiorari on December 2, 1987, and denied his timely motion for rehearing on December 16, 1987. In accordance with Rule 20(1) of this Court, this Application for Writ of Certiorari is filed within sixty (60) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be

taken for public use without just compensation.

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Official Code of Georgia Annotated Sec. 16-1-7(a)(Ga.L. 1968, p. 1249, Sec. 1, Ga. L. 1982, p. 3, Sec. 16):

> (a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:
>
> (1) One crime is included in the other; or
>
> (2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such

conduct.

Official Code of Georgia Annotated Sec. 16-1-6 (Ga.L. 1968, p. 1249, Sec. 1):

> An accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when:
>
> (1) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged; or
>
> (2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

STATEMENT OF THE CASE

Petitioner James C. Freeman, Sheriff of Spalding County, Georgia, from 1981 through 1984, a man who had devoted his entire adult life to serving his community through law enforcement, was convicted of 15 counts of violation of oath of office, and 25 counts of theft by taking, after a jury trial in which

he was jointly tried with his wife, who had acted as his personal secretary during part of his tenure at the Sheriff's Department.

The charges were based on an investigation by Special Agent Angie Miller of the Georgia Bureau of Investigation, who purported to trace certain accounts of the Sheriff's Office by examining both ledger books and deposit slips for the time period of Petitioner's tenure as Sheriff.

Of several indictments brought against Petitioner, one charged him with 15 counts of violation of oath by a public office pursuant to Official Code of Georgia Annotated Sec. 16-10-1, which provides in full that, "Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years."

Another indictment charged Petitioner

with 15 counts of theft by taking, based count by count on the same alleged thefts as formed the basis of the violation of oath charges. The sheriff's wife, Julia Freeman, was charged by separate indictment with 15 counts of Theft by Taking, the dates and amounts being mirrors of those in the indictment against Petitioner. Still another indictment charged Petitioner with 10 additional counts of theft by taking, several on the same dates and from the same deposits as the other alleged thefts.

The gravamen of the charges was that the Sheriff's Office was paid a four percent commission on the revenue from the several pay telephones installed at the Sheriff's Office (which also served as the jail) during Petitioner's tenure. The commission checks were issued periodically, with the amount dependent on collections. The Southern Bell

commission checks were all deposited to the sheriff's general account, according to Agent Miller, but no entries were found in the ledger noting receipt of the checks.

Because Southern Bell checks were deposited, but not posted on any ledger to which Miller had access, and because the deposit and the ledger balanced as to amounts, Miller's conclusion was that an amount of cash equal to the amount of the deposited checks was removed from each deposit, and the Southern Bell check substituted. The counts on the violation of oath of office indictment and the "matching" theft indictments against Petitioner and his wife in effect used the date of deposit of each Southern Bell check to charge that an equivalent amount of currency had been unlawfully taken.

With regards to the 10-count theft by taking "matching" indictments against

Petitioner and his wife, the evidence involved a practice of the Probation Department of delivering certain checks to the Sheriff's Department to cover costs of jailing persons who were charged with violation of probation.

All of the Probation Department checks were deposited to the Sheriff's general account. As with the Southern Bell commission checks, Agent Miller compared deposits to the ledger books she had available to her and determined that they matched, then noted that although the Probation Department checks were deposited, they were not listed on the ledger. Based on that fact, she alleged that funds in the amount of the Probation Department checks were missing. Each count of the ten-count indictments against Petitioner and his wife, used the date of deposit of certain Probation

Department checks to charge that an equivalent amount of currency had been unlawfully taken.

Petitioner testified that in four years as sheriff he never made a deposit or prepared a deposit slip himself. Petitioner also testified that receipts would be turned over from the dispatcher to the sheriff's secretary, that mail was handled by various people, and that several people had access to the wall safe where cash was kept. He also testified that he "didn't take anything" from department funds.

Several other indictments also were returned against Petitioner and tried at the same time, but they are not relevant here because they were disposed of by directed verdicts and one acquittal.

Petitioner filed a motion to quash all indictments prior to trial, in which he specifically alleged that theft by taking and

violation of oath of office allegations were the same and therefore convictions on both indictments were prohibited by the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The lack of evidence against Petitioner was also raised in the pre-trial motion to quash.

Petitioner and his wife were tried together, and at the close of the State's evidence, motions for directed verdicts were made on behalf of both defendants, raising, among other things, the issue of lack of corpus delicti. Directed verdicts of not guilty were granted as to both of the Indictments against the sheriff's wife, but the "mirror" charges against the Sheriff were sent to the jury.

The jury returned verdicts of guilty on all counts of the violation of oath of office

indictment, the 15-count theft indictment dealing with the equivalent amounts to Southern Bell checks, and the 10-count indictment involving the equivalent amounts to the Probation Department checks. Petitioner was sentenced on all counts, with some of the counts consecutive to others, some concurrent.

Following sentencing, a motion for new trial was timely made and amended, raising the due process issues regarding the lack of corpus delicti as well as the double jeopardy-merger issues, and a motion for judgment notwithstanding the verdict, also raising the issues, was considered by the Court as part of the motion for new trial. The motion for new trial, as amended, was denied, and an appeal to the Georgia Court of Appeals was filed in a timely manner, once again raising the issues on which certiorari is here sought. By order dated October 16,

1987, the Court of Appeals affirmed Petitioner's convictions in all respects; by order dated November 2, 1987, rehearing was denied by the Court of Appeals.

An application for writ of certiorari was filed with the Georgia Supreme Court, again raising the issues which this Honorable Court is asked to review; that application was denied by order dated December 2, 1987, rehearing denied December 16, 1987 (Case No. 45224).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S CONVICTIONS AND CUMULATIVE PUNISHMENTS FOR VIOLATION OF OATH OF OFFICE AND MULTIPLE THEFT BY TAKING CHARGES VIOLATE THE DOUBLE JEOPARDY AND DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION (AS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT) AS

INTERPRETED BY THIS COURT IN BLOCKBURGER V. U.S. AND ITS PROGENY, WHERE THE OFFENSES WERE "THE SAME", NOT INVOLVING ELEMENTS DISTINCT TO EACH OFFENSE.

A. THE "MIRROR" CHARGES OF VIOLATION OF OATH OF OFFICE AND THEFT BY TAKING MERGED, USING THE BLOCKBURGER AND GEORGIA STANDARDS.

Official Code of Georgia Annotated Sec. 16-1-7(a) codifies the bar against double jeopardy contained in the Federal and State constitutions by stating that an accused may not be convicted of more than one crime if "one crime is included in the other."

One offense is included in another if "[i]t is established by proof of the same or less than all the facts ... than is required to establish the commission of the crime charged." Official Code of Georgia Annotated Sec. 16-1-6.

Essentially, Georgia follows the clear-

cut rule set down by this Honorable Court in Blockburger v. U.S., 284 U.S. 296 (1931), to wit, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger, id. at 304.

The Court of Appeals of Georgia recognized this rule, and Georgia's restatements of it, in its opinion in the instant case, noting correctly that one crime is not included in the other if "they involve proof of distinct essential elements." Coleman v. State, 163 Ga.App. 173, 174, 293 S.E.2d 395 (1982), Bivens v. State 166 Ga.App. 580, 582, 305 S.E.2d 29 (1983).

The charges of violation of oath of office include as their basis the charges of theft by taking, which charges are lesser

included offenses of the violation of oath of office charges as a matter of fact.

Petitioner, as Sheriff of Spalding County, swore an oath of office that he would "take only my lawful fees," as is required by Official Code of Georgia Annotated Sec. 15-16-4. He was charged by the grand jury of violating that oath of office, by taking funds equal in amounts to Southern Bell commission checks sent to the Sheriff's office. Fifteen separate counts were alleged.

Petitioner was also charged in a separate indictment with 15 counts of Theft by Taking alleging that he took specific amounts of money belonging to the county, on specific dates, which amounts and dates correlated exactly, count by count, with the equivalent amounts and dates on the same count numbers in the indictment dealing with

violation of oath of office.

Proof of the thefts by taking in the instant case included the essential elements of knowingly taking amounts of cash equivalent to the Southern Bell checks, the property of Spalding County, with the intention of depriving said County thereof. Proof of the violations of oath of office included all essential elements of theft by taking, plus the additional elements of proof that Petitioner was the Sheriff of the county and that he had taken money in excess of his lawful fees. The proof as to the taking, the dates, the amounts and the ownership of the funds and the knowledge and intent was identical for conviction of either of the sets of offenses.

Applying the Blockburger standard, the two do not each have an element that is

distinct. Proof of the same facts is needed to establish commission of both crimes. The charges do not just "overlap," as the Georgia Court of Appeals believed; the one set is included in the other. The trial court had the right to try the cases together, but not to enter convictions on both sets of charges. State v. Estevez, 232 Ga. 316, 320, 206 S.E.2d 475 (1974).

In Nave v. State, 171 Ga. App. 165, 318, S.E.2d 753 (1984), the Appeals Court found that the trial court properly instructed the jury in the case of a defendant charged with bribery and violation of oath of office that there could not be conviction on both charges. Proof of the bribery, the Appeals Court found, "would as a matter of fact include the proof of the violation of oath....," and the trial court was right in assuring that Nave was "not improperly

subjected to multiple convictions for the same conduct." Id.

The Georgia Court's ruling in Nave, id., proves that Georgia did not intend its violation of oath of office charge to be cumulative to other charges, and thus removes from consideration the "exception" set up in Blockburger and elaborated upon by this Court in Albernaz v. United States, 450 U.S. 333 (1981) and Missouri v.Hunter, 459 U.S. 359 (1983), where the clear intention of the legislature was for separate punishments for two closely connected offenses.

In the case at bar, Petitioner has clearly been subjected to multiple convictions for exactly the same conduct, to wit: the alleged taking from the lawful ownership of Spalding County amounts of money equal to Southern Bell commission checks.

The State and the Court of Appeals both misplaced reliance on the Georgia case of Sanford v. State, 169 Ga.App. 769, 315 S.E.2d 281 (1984). In that case, "each of the three crimes ...has an additional essential element...." whereas the theft by taking counts against Petitioner require no additional essential elements other than those needed for proof of the violation of oath of office under the facts of the case.

As there was no conflict in the evidence as to the basis for the charges in both indictments, and as the indictments on their face should have been merged, Petitioner was entitled to a directed verdict of acquittal on both sets of charges as a matter of law and the trial Court's failure to grant the motion for direct verdict was reversible error, Merino v. State, 230 Ga. 604 (1973).

Further, the submission to the jury of

both indictments without proper instructions limiting them to a conviction on one set of charges only was clearly prejudicial and violative of the due process guarantees set down by the Fifth Amendment and by the Georgia courts.

Given the convictions of both sets of charges, the Court should not have imposed sentence on both sets. See Davis v. State, 100 Ga. App. 308 (1959) in which the Court notes that convictions for pointing a pistol and also for assault with intent to murder (by shooting the pistol) would have been harmless error had the court "after the verdicts of guilty were returned had by the sentence punished the defendant only for one offense."

Different states handle the problem of substantive double jeopardy quite

differently. For example, the Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977), cert. den. 435 U.S. 999 (1978) quotes a Kentucky statute codifying the bar against substantive double jeopardy that is similar to Georgia's, and finds the bar so compelling as to cause the Supreme Court of Kentucky to set aside a assault conviction it deemed merged with a rape conviction, despite the fact that Appellant there had not raised it at the trial level, Id. at 618. On the other hand, in State v. Manus, 93 N.M. 95, 597 Pac. 280 (1979), the issue was merely whether consecutive sentences could be imposed for counts of murder, attempted murder and aggravated assault -- the Supreme Court of New Mexico ruled that they could. Viewing the issue in a somewhat different light, the Illinois Appellate Court held in People v. Mays, 81 Ill.Dec. 66, 401 N.E. 2d 1159 (1980)

that "where more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." 401 N.E. 2d at 1167.

Georgia's own decisions are inconsistent with the Court of Appeals ruling in Petitioner's case. See Nave v. State, 171 Ga.App. 165 (1984)(violation of oath is lesser included offense of bribery), Lamar v. State, 243 Ga. 401 (1979)(appeal dismissed for want of substantial federal question, 444 U.S. 803 (1979)(accused may be prosecuted for rape and child molestation based on the same conduct, but not convicted of both), Day v. State, 163 Ga.App. 839 (1982)(bad check charge and theft by deception considered same "transaction" and thus trial of latter barred

by double jeopardy provision), Young v. State, 177 Ga. App. 756 (1986) (armed robbery and aggravated assault merged).

As Mr. Justice Rehnquist so aptly put it in Albernaz v. United States, 450 U.S. 333, 343 (1980),

> While the Clause itself simply states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.

Certiorari is needed to clarify this issue, to bring some coherence to the way different States view the double jeopardy guarantee, and to help state courts to "navigate the Sargasso Sea."

B. THE THEFT COUNTS, SEPARATELY INDICTED, BUT CHARGING THEFTS OF SEPARATE AMOUNTS OF CASH FROM THE SAME DEPOSITS, ARE

THE SAME OFFENSES, AND CONVICTIONS SHOULD NOT HAVE BEEN ENTERED AS TO BOTH SETS OF CHARGES.

In two separate indictments, Petitioner was charged with thefts of different sums of money on the same date from the same deposits. The sums represented amounts equivalent to Southern Bell checks that were deposited, and amounts equivalent to Probation Department checks that were deposited.

> [I]t is a plain doctrine of all our courts that, if in a single transaction more articles than one belonging to the same owner are stolen, the indictment may charge the larceny of the whole in one count. It is but one larceny.

Breland v. State, 135 Ga. App. 478, 479, 218 S.E.2d 153 (1975), quoting Dean v. State, 9 Ga. App. 571.

In Breland, two trucks were taken from the same place at the same time from the same owner, and this Court reversed a conviction

as to one of the thefts.

In Hubbard v. State,, 168 Ga. App. 778, 310 S.E.2d 556 (1983), Defendant was charged with taking a motor vehicle and several other items, including a stereo, checkwriter and keys, from an automobile dealership. The conviction as to Count 2, involving the stereo, checkwriter and keys was reversed as a "duplicate" of Count 1, Id. at 781.

> [F]or separate offenses...to carry separate punishments, they must rest on distinct criminal acts. If they were committed at the same time and place and parts of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment. Hubbard at 780,

quoting Bell v. United States, 349 U.S. 81, 75 S.Ct. 620 (1955).

In the case at bar, the thefts alleged were committed at the same time and place and with the same intent, if any.

The Court of Appeals of Georgia relied on Hiatt v. State, 133 Ga.App. 111, 113, 210 S.E.2d 22 (1974) in holding that the alleged thefts, like the property damage in Hiatt, was the same kind of conduct, recurring in a number of instances. However, the conduct in Hiatt, which constituted two separate crimes, involved one charge of criminal damage to property rented by Defendant and a different and distinct charge of criminal trespass with regards to a neighbor's door frame. Although the two distinct offenses involved the "same type of conduct," there were "two offenses committed at different apartments under different tenancies..." which occurred "at different times." Hiatt at 113.

Hiatt is distinguishable from the case at bar and from Hubbard, which involved a car stolen from one area of an automobile

dealership and other items stolen from another area at the same time, and Breland, which involved two trucks stolen at the same time from the same place.

In the case at bar, the Court of Appeals labors to find that funds allegedly pilfered on the same dates from the same deposits comprise distinct crimes due to the fact that two different checks -- one from Southern Bell and one from the Probation Department -- were substituted for the allegedly missing cash. That logic would carry through to hold that a robber, taking a purse and a necklace from a victim, should be charged with two separate robberies because the purse and the necklace were acquired by the victim at separate times.

Arbitrary denial of a state created right is a violation of due process. Hicks v.

Oklahoma, 447 U.S. 343 (1980), Greenholtz v. Inmates, 442 U.S. 1 (1979). Georgia has created a right in its caselaw, see Breland, and Hubbard, supra, hewn from the Fifth Amendment, and indicating that separate "parts" of the same crime are not to be punished separately. Petitioner was arbitrarily denied this right when the Court of Appeals upheld his conviction on two counts of theft for each chunk of cash missing from each deposit, and his due process rights were violated thereby.

In the current case, the situation was made worse by the fact that three sentences were actually imposed for each "short" deposit -- two theft by taking sentences and the violation of oath of office sentence. Certiorari is needed on this ground both to vindicate Petitioner's due process rights and to clarify substantive double jeopardy as

applied to incidents of the same exact conduct occurring at the same time and in the same place.

II.

DOES GEORGIA'S PROSECUTION OF PETITIONER FOR CRIMES IN WHICH NEITHER CORPUS DELICTI NOR INTENT WAS PROVED, LOOKING AT THE FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE, VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT?

It is axiomatic to our jurisprudence that due process, at the very least, requires proof that a crime has been committed, that the defendant is the one who committed it, and that there was some form of mens rea or intent involved, prior to a conviction being entered.

"The requirement that guilt of a criminal charge be established beyond a reasonable doubt dates at least from our early years as a Nation," In re Winship, 397 U.S. 358 (1970) and is a right guaranteed by the due process clauses of the Fifth and Fourteenth Amendents, id. This requirement goes to each material element of a criminal charge.

"Before there can be a lawful conviction of a crime, the corpus delicti, that is, that the crime charged has been committed by some one, must be proved beyond a reasonable doubt." Wrisper v. State, 193 Ga. 157, 161, 17 S.E.2d 714 (1941).

In the case at bar, directed verdicts were granted to Petitioner's wife on theft by taking indictments that mirrored exactly the theft indictments against Petitioner. In granting the directed verdict, the trial

Court summarized the evidence as follows:

> [T]he testimony before this Court is that the checks were deposited into an account. That there was no corresponding entry made into such ledgers as were found in the Sheriff's Office at the time --on December the 31st of 1984. What concerns me about this is that I see no proof or no facts or nothing that money was removed from some fund or removed from some account by one of these defendants.

If the Court found no proof as that funds were missing, it defies reason to direct a verdict on that ground as to one defendant and allow the co-defendant to proceed to the jury.

Failure to grant Petitioner's motion for directed verdict on the same grounds that co-defendant's motion was granted was reversible error, under Georgia law, Merino v. State, 230 Ga. 604 (1973), and violated Petitioner's rights to a fair trial pursuant to the Fifth and Sixth Amendments to the Constitution as

applied to Georgia by the Fourteenth Amendment. The trial court had no illusions as to the lack of evidence presented by the State:

> [T]he testimony, as I understand it, is the checks...were deposited into the general account of the Sheriff's Department of Spalding County, Georgia. The testimony, as I understand it further, is that receipts were not written in the receipt book for these checks,that ledger entries were not made in the ledger books that are introduced into evidence for these checks. I further understand the testimony to be that there is no proof that the books, accounts, and records introduced as exhibits in this trial are all of the books of the Sheriff's Office during Sheriff Freeman's administration.... Now my concern ...is that proof of a check or a receipt of cash not listed on a ledger is not proof that the funds are missing, especially since the evidence shows that the checks were deposited to the Sheriff's ...account....[h]ow does the State contend that they have made out a case of missing funds unless the State can show that funds were removed illegally from the general

account of the Sheriff's Department?

Whether the ledgers examined by Agent Miller were the only ledgers used during Petitioner's administration was never proven. During Petitioner's tenure, a new jail was built, and the new sheriff testified that he never knew for sure whether all the books from the old jail were moved to the new facility. The State never showed the loss of any funds, nor the destination of any stolen funds, and, thus, a corpus delicti was never established.

The Court of Appeals cites Ware v. State, 143 Ga.App. 663, 239 S.E.2d 552 (1977) for the proposition that it is "not essential to the proof of the corpus delicti that stolen property be recovered," Court of Appeals at 7. However, the issue is not the non-recovery of stolen property; rather, it is the failure of the State to prove that any

property was stolen or diverted in the first place.

Further, with regards to intent, and identity of the perpetrator, if funds were indeed missing or stolen, there was never any proof offered that Petitioner even had access to the funds involved.

The testimony as to the Probation Department checks at issue in one set of charges was that up to 10 different people would receive them, and that they would then be given the dispatcher, then the secretary, to log and deposit. With regards to the Southern Bell checks that are the subject of the other theft charges and the violation of oath charges, the testimony was that they would be mailed and mail was handled by various people.

Petitioner testified that in four years as sheriff he never made a deposit himself.

The lack of proof as to any connection between Petitioner and the allegedly missing money was such as to require a directed verdict on all counts.

Official Code of Georgia Annotated Sec. 16-2-1 defines a "crime" as "a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence." Official Code of Georgia Annotated Sec. 16-2-2 prohibits conviction where there was no "criminal scheme or undertaking, intention or criminal negligence." Official Code of Georgia Annotated Sec. 16-2-6 states that "[a] person will not be presumed to act with criminal intention...."

The trial Court, in its charge to the jury, instructed correctly that

> Proof of the crimes of theft by taking and violation of the oath

> of a public officer both require proof beyond a reasonable doubt of a specific intent to commit the crimes by the defendant charged therewith...specific intent means more than general intent to commit an act. To establish specific intent, the State must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids purposefully intending to violate the law.

No intention on Petitioner's part to violate his oath or take property of the county, was ever shown, either by direct evidence or by inference. No prima facie showing was made of any specific intent, or indeed, of any knowledge by Petitioner as to the book-keeping practices that led Agent Miller to conclude that a theft had taken place.

Without any evidence as to intent, a material element of both charges involved herein, the motion for directed verdict should have been granted.

However, when granting the motion for directed verdict for Petitioner's wife, the trial Court stated that he denied it as to Petitioner, "inasmuch as Mr. Freeman was in charge of the office...." The presumption that Petitioner was criminally responsible for what occurred in his office, whether or not it he knew of it, is outrageous.

Proof of the charges was exactly the same -- in fact, the counts in Mrs. Freeman's indictments are almost word for word the counts in Petitioner's indictments, and the evidence was stronger as to Mrs. Freeman, who handled the funds and made the deposits, than was as to Petitioner, who did not. In the case at bar, there is no indication as to where the allegedly missing money went, whether there really was money missing, and/or that the Sheriff had contact with any of the funds for which the Southern Bell and

Probation Department checks were substituted.

The convictions are based on speculation as to intent, as to identity of perpetrator, and on gross speculation as to the whether or not there was ever any taking at all.

Even when the case is viewed in the light most favorable to the prosecution, no "rational trier of fact could have found proof of guilt beyond a reasonable doubt" on the charges of which Petitioner was convicted. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781. This matter should never have been sent to a jury, no "rational" jury could have found guilt beyond a reasonable doubt, and due process compels review by this Court to establish minimum due process standards for convictions on these kinds of "paper" cases against public officials, which are becoming increasingly prevalent.

CONCLUSION

For all of the above reasons, Petitioner prays that this Honorable Court will grant certiorari to the Georgia Court of Appeals, to clarify the "Sargasso Sea" of substantive double jeopardy case law, to set minimum due process standards for convictions, and also to vindicate the individual rights of a man who has devoted his life to an orderly administration of justice and now stands bereft of the benefits that, as a peace

officer, he tried to accord to all others.

Respectfully submitted this 13th day of June, 1988.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies each of the within and foregoing Petition for Writ of Certiorari upon Michael J. Bowers, Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon Johnnie C. Caldwell, Jr., District Attorney, Griffin Judicial Circuit, P.O.Box 1191, Thomaston, Georgia 30286, by depositing same in the United States mail in properly addressed envelopes with adequate postage affixed thereon. I further certify that all parties required to be served have been served.

This 13th day of February, 1988.

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APPENDIX

In the Court of Appeals of Georgia

75080. FREEMAN v. THE STATE.

DEEN, Presiding Judge.

Appellant, James C. Freeman, was Sheriff of Spalding County from 1981-1984. When he sought re-election, he was defeated by Richard Cantrell, a former deputy. After the new sheriff took office, he asked the GBI to investigate "possible improprieties" at the Sheriff's Department. As a result, charges were brought before the grand jury which returned six indictments against Freeman, each containing multiple counts. The indictments alleged either theft by taking or violation of oath by a public officer. Appellant's wife, who was his secretary during a portion of his tenure as sheriff, was charged with multiple counts of theft by taking in two different indictments.

Appellant moved to sever their trials, but the motion was denied and they were tried together. The court granted directed verdicts of acquittal to Julia Freeman on both indictments and in favor of appellant on two indictments. The jury returned guilty verdicts on three indictments and not guilty on one. This appeal follows the denial of his motion for a new trial.

1. Appellant first contends that the charges of violation of oath by a public officer and theft by taking in two indictments merged. He claims that the dates and amounts correlated exactly, count by count, and therefore violated OCGA Sec. 16-1-7 (a), the codification of the bar against double jeopardy. This code section provides: "When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each

crime. He may not, however, be convicted of more than one crime if: (1) One crime is included in the other; or (2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." One crime is not included in the other if "they involve proof of distinct essential elements." Coleman v. State, 163 Ga. App. 173, 174 (293 SE2d 395) (1982); Bivens v. State, 166 Ga. App. 580, 582 (305 SE2d 29) (1983). The crimes of theft by taking and violation of oath by a public officer have distinct elements. See Sanford v. State, 169 Ga. App. 769 (315 SE2d 281) (1984). The essential elements of theft charges are that appellant, while in possession of certain funds which were the property of Spalding County, unlawfully appropriated them with the

intention of depriving the county of these funds. Violation of oath by a public officer requires the State to prove that appellant was a public officer and that he violated his oath of office by receiving more than his lawful fees. There is an overlapping of proof in that the violation of the oath of office was proven by the taking of funds belonging to the county which was derived from pay phones and probation fees. Proof that appellant took these funds and used them for his own benefit established violation of his oath of office as well as the separate charge of theft by taking. The essential elements for each crime, however, are different. "An accused may be prosecuted for each crime arising from the same conduct. The proscription is that he may not be convicted of more than one crime if one crime

is included in the other." State v. Estevez, 232 Ga. 316, 320 (206 SE2d 475) (1974). As one offense was not included in the other, this enumeration is without merit.

2. Appellant claims that five counts of indictment number 9233 and five counts of indictment number 9234, both of which allege theft by taking, are part of the same offenses and the convictions obtained should not have been entered on both.

An examination of the two indictments reveals that each alleges theft offenses occurring on five different dates and, while each of the dates is duplicated in the second indictment, the amount allegedly stolen is different. The evidence showed that these amounts represent checks received from two separate sources: Southern Bell and the Probation Department. The State also showed that none of the checks in question were

entered on the accounting ledger and there is no indication as to when appellant actually received them. Although appellant's acts in converting these checks were similar, they were not a single transaction and the rule in Hubbard v. State, 168 Ga. App. 778 (310 SE2d 556) (1983), does not apply as the acts were not committed at the same time and place as part of a continuous criminal act. The checks in question were received by appellant from two different sources and represented sums of money belonging to Spalding County. In order for the transaction to be the same, it must be identical both as a matter of fact and as a a matter of law. Hiatt v. State, 133 Ga. App. 111, 113, (210 SE2d 22) (1974). the transactions in the instant case are similar to those in Hiatt, supra, in that it was the same type of conduct, recurring in a

number of instances. The fact that the checks were received from two different sources and were deposited on the same day is immaterial in determining the number of offenses committed by appellant. His conviction as to each charge was authorized by the evidence.

3. Freeman's contention that directed verdicts of acquittal should have been granted on all the indictments is without merit. The trial court did not err in denying appellant's motion for a directed verdict of acquittal, "as, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Wright v. State, 235, Ga. 1, 3 (316 SE2d 445) (1984). It proved that appellant, as sheriff, had authority over funds collected by his office

which were the property of Spalding County, that these funds were never delivered to the county, and that these funds remained in his possession. Intent to deprive the county of money was established through the testimony of a witness and proof that the checks received from Southern Bell and the Probation Department were deposited in the bank, but were never entered on the accounting ledger and were not received by the county. There was further evidence that the sheriff used these funds for his own purpose. The State established that appellant had possession of and control over the checks in question and we find that the trial court did not err in denying a motion for directed verdict of acquittal.

The denial of motions for a directed verdicts as to indictments 9233 and 9234 did

not cause inconsistent verdicts. The evidence showed the appellant directed that all monies received at the jail be turned over to him and that he kept much of this money in his desk drawer to dispense as he pleased. He did this in disregard of a county mandate requiring all funds derived from goods or services on county property be turned over to the county. Appellant's claim that funds were never established to be either "lost" from the sheriff's office or "found" in his possession is without merit. The evidence showed that amounts equal to the Southern Bell and Probation Department payments were diverted from the county and that appellant, as sheriff, received and was responsible for all checks delivered to and received by his department. It is not essential to the proof of the corpus delicti that stolen property be recovered. Ware v.

State, 143, Ga. App. 663 (239 SE2d 552) (1977).

The court's denial of a motion for a directed verdict for failure to prove the identity of the perpetrator was correct. The evidence was uncontroverted that Freeman had possession and control over funds received by his department and that he directed his employees to turn over any money they received directly to him. With regard to the checks from Southern Bell, the evidence showed the appellant stopped turning them over to his secretary so she could enter them in the ledger book a few months after he took office. As to an alleged failure to prove intent, the State provided sufficient evidence from which intent could be inferred by the jury.

4. County and state officials charged

with malpractice, misfeasance or malfeasance in office are granted a special right to appear before a grand jury. OCGA Sec. 17-7-52, Sec. 45-15-11, Sec. 45-11-4. Appellant contends that he was never given a copy of proposed indictment number 9233 as required by OCGA Sec. 45-11-4, and that he was not allowed to be present during consideration of proposed indictment number 9231 and his attorney was not permitted to examine the documents that were to serve as evidence. As this issue was not raised in the court below, it will not be considered by this court on appeal. Lane v. State, 180 Ga. App. 168 (348 SE2d 711) (1986).

5. It was not an abuse of the trial court's discretion to deny a severance and require appellant and his wife to be tried together. In exercising this discretion, the

trial court must consider whether the number of defendants will create confusion as to the law applicable to each, whether there is a danger that evidence admissible against one would be considered against the other, and whether the defendants' defenses are antagonistic to each other's rights. Cain v. State, 235 Ga. 128, (218 SE2d 856) (1975). None of these factors were present in the instant case and appellant fails to make a clear showing of any prejudice resulting in the denial of a fair trial. Tanner v. State, 176 Ga. App. 77, 78 (335 SE2d 133) (1985). Indeed, the grant of a directed verdict of acquittal in favor of appellant's wife removed her case from the jury's consideration and any possibility of confusion by the jury was removed from the case.

6. The evidence presented at trial, when viewed in a light favorable to the prosecution, was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt. Crawford v. State, 245 Ga. 89 (263 SE2d 131) (1980).

Judgment affirmed. Birdsong, C. J., and Pope, J., concur.

COURT OF APPEALS of the State of Georgia,

Atlanta, Nov. 2, 1987

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

75080. JAMES C. FREEMAN V. THE STATE

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA NOV. 2, 1987

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin, Clerk.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Dec. 2, 1987

Case No. 45224. Freeman v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Smith & Bell, JJ., who dissent.

Very truly yours,

/s/ Joline B. Williams, Clerk

Clerk's Office, Supreme Court of Georgia
Atlanta Dec. 16, 1987

The motion for a rehearing was denied today: Case No. 45224. Freeman v. State

/s/ Mrs. Joline B. Williams,
Clerk

Supreme Court, U.S.
FILED
APR 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1403

In The
Supreme Court of the United States
October Term, 1987

JAMES C. FREEMAN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the court below properly conclude that no double jeopardy violation occurred in this case because the offenses for which Petitioner was convicted each required proof of distinct elements that the other did not?

II.

Did the court below properly conclude that the evidence authorized the jury to find Petitioner guilty beyond a reasonable doubt?

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No. 87-1403

In The

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October Term, 1987

JAMES C. FREEMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE
STATEMENT OF THE CASE

Petitioner, James C. Freeman, a former sheriff of Spalding County, Georgia, was indicted by the Spalding County grand jury upon six indictments containing multiple counts, charging him with either theft by taking or violation of oath by a public officer. Petitioner's wife, who served as his secretary during a portion of his term as sheriff, was charged in two separate indictments of multiple counts of theft by taking. The motion to sever the trials was denied. The trial court directed verdicts of acquittal as to Petitioner's wife on both indictments and as to Petitioner on two indictments. The jury ac-

quitted Petitioner on one indictment and found him guilty under three indictments. Specifically, Petitioner was found guilty under indictment number 9321 of 15 counts of violating his oath as a public officer in that he "did take and receive funds of Spalding County" in 15 separate amounts equal to 18 numbered commission checks from Southern Bell Telephone and Telegraph on fifteen separate dates, with these amounts "not being a part of his annual salary or fees to which he is lawfully entitled . . . ." (Trial Record 3-11). Under indictment number 9233, Petitioner was found guilty of 10 counts of theft by taking, in that Petitioner took on 10 separate dates 10 amounts of United States currency which was the property of Spalding County and taking "with the intention of depriving said owner of said property." (Trial Record 14-19). Under indictment number 9234, Petitioner was convicted of 15 counts of theft by taking in that he on 15 separate dates took 15 separate amounts of the United States currency from Spalding County "with the intention of depriving said owner of said property." (Trial Record 20-28). Under indictment number 9231, which were felony convictions, the trial court sentenced Petitioner to serve five years on count one plus restitution; a consecutive five year sentence on count two; and five years each on the remaining thirteen counts, to run concurrently to counts one and two. (Trial Record 12; Trial Transcript 770) (hereinafter designated T.). The theft by taking convictions were "all misdemeanors" because of the amounts involved. (T. 770). Under indictment number 9233, Petitioner was sentenced to serve twelve months on each of counts one through five and pay a fine on each of the five counts in the amount of $150.00. *Id.* Petitioner was also order to pay a $15.00

training fee on each of those counts. On the remaining counts under indictment number 9233, Petitioner was sentenced to twelve months each, to be probated, plus the $150.00 fine and $15.00 training fee on each count. (T. 771). Under indictment number 9234, Petitioner was sentenced to a twelve month probated sentence on each of the counts, to run concurrently, as well as pay a $150.00 fine and $15.00 training fee on each count. *Id.*

On direct appeal, the Georgia Court of Appeals rejected Petitioner's contention that the theft by taking charges under indictment number 9234 were lesser included offenses of the violations of oath by a public officer under indictment number 9231 as well as Petitioner's contention that the evidence was insufficient. *Freeman v. State,* 184 Ga. App. 678, — S.E.2d — (1987). That court affirmed Petitioner's convictions and sentences on October 16, 1987, and denied his motion for rehearing on November 2, 1987. The Supreme Court of Georgia denied certiorari on December 2, 1987. This petition for writ of certiorari seeks review of the judgment of the Supreme Court of Georgia.

A review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not the petition for certiorari should be granted. Therefore, a summary of the evidence submitted at Petitioner's trial is presented as follows.

Petitioner, James "Butch" Freeman, became Sheriff of Spalding County on January 1, 1981. Petitioner lost a bid for re-election in November 1983 to his former employee, Richard Cantrell. (T. 196). On or about midnight December 31, 1983, the newly elected sheriff went to the

jail to assume office. (T. 197). He checked the records left behind by Petitioner. *Id.* Cantrell secured the accounting ledgers, receipt books, and also had G.B.I. agent Dan Green secure and inventory the evidence room. (T. 224). This was done pursuant to instructions he received in his training to become sheriff.

The new sheriff learned that both records and receipt books were missing and wrote to the Spalding County commissioners about locating them. (T. 199). After the commissioners responded they did not have the missing items, the new sheriff went before the grand jury in February 1984 to learn what he could about any missing records and money.

As a result of the new sheriff's appearance before the grand jury, agent Angie Miller of the Georgia Bureau of Investigation was assigned to investigate any improprieties at the Spalding County Sheriff's Department. Agent Miller contacted the local district attorney on February 27, 1985. (T. 408-409).

The investigation originally focused on missing wrecker logs, drug informant records, "pistol toter" permit records and license fees, the jail "inmates' store" records and proceeds thereof, and checks from Southern Bell. (T. 409-10). The investigation then expanded to include the Junior Deputy Program as well as money apparently not received from probation checks. *Id.*

Agent Miller learned that the Sheriff's Office had collected $5.00 per pistol permit in 1981, but Petitioner claimed that no license fees were collected until 1982. (T. 411, 421). No entry for any pistol license fee was recorded until November 1982. (T. 421).

Agent Miller also learned that only six entries were made in January-March 1981 for Southern Bell commission checks. There were no other records that the Sheriff's Department had received these checks. (T. 424-26). The back of each cancelled check, however, had a deposit date stamped on it. *Id.* Each date corresponded with deposit dates noted in the accounting ledger, but the amounts recorded in the accounting ledged did not include the Southern Bell check amounts. (T. 434-69). Petitioner explained that the Southern Bell check moneys were deposited under the "pistol toters" account. (T. 426). However, agent Miller could find no corresponding entries under the pistol fee entries in the ledger. (T. 434-69).

With regard to checks from the probation department, Agent Miller learned that these same bookkeeping principles were utilized in that the checks had been deposited into the probation account but not entered in the ledger. (T. 473-500). The ledger entries for bank deposits for the probation checks, when compared with the probation check amount, did not include the amount of the probation checks. *Id.* In other words, the checks had been negotiated but not ever recorded.

Barbara Woodle served as Petitioner's secretary/bookkeeper for his first eight months in office. (T. 311). She received and sent out checks and entered each transaction in the accounting ledger. (T. 314). Among the checks she would receive were those from Southern Bell, and she always entered these checks in the ledger. (T. 318). After three months, Ms. Woodle did not receive any Southern Bell checks. (T. 315). She never knew why. (T. 318-19).

Ms. Woodle was eventually succeeded by Petitioner's wife, who served as secretary January 1982-December 1984.

The checks to the Sheriff's Department from Southern Bell were received periodically, and the amounts varied as they represented a commission of revenue from pay telephones installed in the Spalding County jail. (T. 176-78). The Coca Cola Company also had installed a vending machine at the jail, and Petitioner would receive a percentage of the revenue through checks from the Coca Cola Company. *Id.* (T. 38-40).

Petitioner personally received the money collected for the "pistol toters" license fees, for copies of incident reports, and for liquor licenses. (T. 278-79, 285-87). Petitioner instructed Alice Leverette, the secretary for the Criminal Investigation Division, to deliver those checks directly to him as "the county got enough money as it was." (T. 279). Although Petitioner claimed he would use the money to buy shoes for deputies and flowers when needed, Barbara Woodle testified that she was unaware of any such items ever being bought with Sheriff Department funds. (T. 279; 333-34). She would take up a collection from the individual employees to buy flowers. *Id.*

Petitioner also received checks from the Probation Department. *Id.* These were for room and board as well as warrant fees. *Id.*

As part of the "inmates' store" in the jail, all money that Petitioner netted as profit or any other money arising from the selling of products at the Sheriff's Department or jail belonged to the County. (T. 391). Spalding County policy provided that any person receiving any moneys had to turn over those to the Board of Commis-

sioners at least once a month, and the Sheriff's Department was subject to this policy. (T. 386).

The jury found Petitioner guilty of fifteen counts of violation of oath by a public officer, for ten separate counts of theft by taking under indictment number 9233, and for fifteen counts of theft by taking under indictment number 9234. (T. 754-58).

———o———

PART TWO
REASONS FOR NOT GRANTING THE WRIT

I. AS THE COURT BELOW PROPERLY CONCLUDED THAT PETITIONER WAS NOT SUBJECTED TO DOUBLE JEOPARDY BECAUSE EACH OF THE CRIMES REQUIRED PROOF OF DISTINCT ELEMENTS THAT THE OTHER DID NOT, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI.

Petitioner contends that the Georgia Court of Appeals erred in concluding that Petitioner was not subjected to multiple punishments for the same offense in declining to find that the violations of an oath by a public officer conviction under indictment 9231 allegedly rested upon the same evidence as the theft by taking convictions under indictment 9234. Respondent submits that when deferring to the state's construction of the state statutes involved, the appellate court decision finding no double jeopardy violation is correct as each crime required proof of distinct elements and facts.

Petitioner was charged with violating his oath as a public officer under O.C.G.A. § 16-10-1. This code section provides as follows:

> Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

O.C.G.A. § 16-10-1. The sheriff was required to take the following oath, which is the statutory oath administered to sheriffs in Georgia:

> I do swear that I will faithfully execute all writs, warrants, precepts, and processes directed to me as sheriff of this county, or which are directed to all sheriffs of this state, or to any other sheriff specially, which I can lawfully execute, and true returns make, and in all things well and truly, without malice or partiality, perform the duties of the office of sheriff of ..... County, during my continuance therein, and *take only my lawful fees.* So help me God.

O.C.G.A. § 15-6-4 (emphasis added). O.C.G.A. § 16-10-1 "makes penal the wilful and intentional violation of his oath by any public officer." *Beckman v. State*, 229 Ga. 327, 331, 190 S.E.2d 906 (1972). Thus, the prosecution was required to prove that Petitioner was a public officer and that he violated his oath of office.

Theft by taking is defined in Georgia as follows:

> A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

O.C.G.A. § 16-8-2. "[T]he gravamen of the offense is the taking of the property of another against the will of the other." *Stull v. State*, 230 Ga. 99, 100, 196 S.E.2d 7 (1973). Theft by taking requires proof of a specific intent. *Jer-*

ome v. State, 143 Ga. App. 649, 239 S.E.2d 541 (1977). The theft by taking is completed "where there is an asportation, however slight, and although the goods are not removed from the land of the owner." *Henderson v. State*, 167 Ga. App. 808, 809, 307 S.E.2d 704 (1983).

The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution after an acquittal for the same offense, a second prosecution after conviction for the same offense, or multiple punishment for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). It is the third form of double jeopardy of which Petitioner complains in the instant case. The test for determining whether crimes are separate was established in *Blockburger v. United States*, 284 U.S. 299 (1932). This test provides as follows:

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, supra at 304. If one of two statutes requires proof of a fact that the other does not, then there is no constitutional impediment in punishing the defendant for both offenses. *Albernaz v. United States*, 450 U.S. 333 (1981).

The Georgia Court of Appeals in this case applied the essence of the *Blockburger* test, noting, "One crime is not included in the other if 'they involve proof of distinct essential elements.'" *Freeman v. State*, 184 Ga. App. at

687. The court noted that the crimes of theft by taking and violation of oath by a public officer "have distinct elements." *Id.* The court held as follows:

> The essential elements of theft charges are that appellant, while in possession of certain funds which were the property of Spalding County, unlawfully appropriated them with the intention of depriving the county of these funds. Violation of oath by a public officer requires the State to prove that appellant was a public officer and that he violated his oath of office by receiving more than his lawful fees. There is an overlapping of proof in that the violation of the oath of office was proven by the taking of funds belonging to the county which was derived from the pay phones and probation fees. Proof that appellant took these funds and used them for his own benefit establishes violation of his oath of office as well as the separate charge of theft by taking. The essential elements for each crime, however, are different. 'An accused may be prosecuted for each crime arising from the same conduct. The proscription is that he may not be convicted of more than one crime if one crime is included in the other.' *State v. Estevez*, 232 Ga. 316, 320 (206 S.E.2d 475) (1974). As one offense was not included in the other, this enumeration is without merit.

Freeman v. State, 184 Ga. App. at 678-79.

Respondent notes that this Court is bound by Georgia's construction of the two statutes in issue. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). The fact that there was some overlapping of proof does not established a double jeopardy violation; rather, *Blockburger* is satisfied if each crime "requires proof of a fact that the other does not . . . ." *Ianelli v. United States*, 420 U.S. 770, 785 n. 17 (1975).

Respondent submits that the court below correctly concluded that both as a matter of fact and a matter of law no double jeopardy violation occurred in this case. The crime of theft by taking was completed when Petitioner failed to turn over the moneys to Spalding County, evidencing his specific intent to deprive the county of those moneys. Petitioner then violated his oath as sheriff by using those funds for his own benefit, thereby receiving more than his lawful fees in violation of his statutory oath. In that the court below properly concluded that as a matter of fact and a matter of law the two crimes in this case are separate and distinct and require proof of essential elements that the other does not, no double jeopardy violation has been shown. Thus, this Court should decline to grant certiorari for this reason.

Petitioner has also contended that the separate thefts occurring over a span of sixteen months should be viewed as one transaction. This Court has refused to adopt a "single transaction" view of the double jeopardy clause. *Garrett v. United States*, — U.S. —, 105 S.Ct. 2407, 2418 (1985). Thus, this claim does not serve as a basis for the granting of certiorari.

II. AS THE EVIDENCE AUTHORIZED THE JURY TO FIND PETITIONER GUILTY BEYOND A REASONABLE DOUBT, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI ON THIS BASIS.

In his second issue presented to this Court for review, Petitioner has, in effect, asked this Court to grant certiorari simply to review the sufficiency of the evidence in this case supporting his convictions. Petitioner would

ask this Court to revisit *Jackson v. Virgina*, 443 U.S. 307 (1979), but only as applied to the facts of this case. Respondent submits that as the record amply supports the findings of the court below that the evidence satisfies the reasonable doubt standard, no basis for certiorari has been shown.

On direct appeal, the Georgia Court of Appeals found that the evidence in this case "when viewed in a light favorable to the prosecution, was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt." *Freeman v. State*, 184 Ga. App. at 681. The court rejected Petitioner's contention that the evidence did not show that the sheriff personally had the funds in his possession. *Freeman v. State*, 184 Ga. App. at 679-80. "Possession of money may be actual or constructive." *DeFoor v. State*, 233 Ga. 190, 192, 210 S.E.2d 707 (1974). The court noted that the essential element of specific intent to deprive the county of funds "was established though the testimony of a witness and proof that the checks received from Southern Bell and the Probation Department were deposited in the bank, but were never entered on the accounting ledger and were not received by the county." *Freeman v. State, supra.* The court further noted that there was also additional evidence that Petitioner personally utilized these funds. *Id.* The court concluded that the state sufficiently established that Petitioner had "possession of and control over the checks" in question so that the evidence was not insufficient for this reason. *Freeman v. State, supra.*

Petitioner has contended before this Court that it is *per se* unconstitutional to rely upon circumstantial evi-

dence of the corpus delecti where the stolen property is not recovered. However, this federal constitutional question was not specifically raised below in Petitioner's brief in support of the enumeration of errors and should not now be considered by this Court for the first time in the instant petition. *Cardinale v. Louisiana*, 394 U.S. 437 (1979).

Moreover, Respondent submits this allegation, even if reviewed by this Court, is without merit as "deprive" in O.C.G.A. § 16-8-2 includes "dispos[ing] of the property as to make it unlikely that the owner will recover it." O.C.G.A. § 16-8-1(1)(B). What is important to the crime of theft by taking is "proof of the description, value, and ownership of the stolen property." *State v. Ramos*, 145 Ga. App. 301, 243 S.E.2d 693 (1978). That the stolen property is not recovered is not essential to proof of the corpus delecti in Georgia. *Ware v. State*, 143 Ga. App. 663, 239 S.E.2d 552 (1977). To require that the state must recover stolen property in order to prosecute would allow a thief to avoid prosecution simply by successfully disposing of the property before criminal proceedings could arise.

The court noted that the evidence showed that "amounts equal to the Southern Bell and Probation Department payments were diverted from the county and that appellant, as sheriff, received and was responsible for all checks devilered to and received by his department." *Freeman v. State, supra.* The court concluded that the evidence was not insufficient for this reason. *Id.*

Petitioner also contended below that the evidence was insufficient to establish the identity of the perpetrator,

but the court below noted that not only was Petitioner in possession and control of the funds in his capacity as sheriff but that he had specifically directed employees to give money directly to him. *Freeman v. State, supra.* The court also concluded that the evidence regarding intent was not insufficient, simply noting that the state "provided sufficient evidence from which intent could be inferred by the jury. *Id.* Specific intent is a jury question in Georgia. *Jerome v. State, supra.*

In conclusion, the evidence in this case amply supports the conclusion of the court below that the evidence authorized the jury to find Petitioner guilty beyond a reasonable doubt. As Petitioner has not shown that a federal question was presented and wrongly decided, this Court should decline to grant certiorari on this basis.

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CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court and that no federal question not previously decided by this Court is presented.

Respectfully submitted,

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